

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 20, 2006

STATE OF TENNESSEE v. ALBERT BUCHANAN

Appeal from the Circuit Court for Marion County
Nos. 5599, 5599A, 5599B, 5599C, 6465 John Curtis Smith, Judge

No. M2006-01186-CCA-R3-CD - Filed January 29, 2007

The Defendant, Albert Buchanan, pled guilty to two counts of aggravated burglary and was sentenced to serve four years and six months on probation. The Defendant violated his probation by committing a theft of a vehicle over \$10,000 in value, and pled guilty to serve one year in the Department of Correction and three years on supervised probation to run consecutively to his initial probationary sentence. Once released from his incarceration, the Defendant was again found to have violated the terms of his probation by committing domestic violence against his parents. The trial judge ordered that the Defendant serve his sentence in the Department of Correction. The Defendant now argues that the trial court abused its discretion by revoking the Defendant's probation. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Philip A. Condra, District Public Defender and Charles Doug Curtis, II, Assistant Public Defender, Jasper, Tennessee, for the appellant, Albert Buchanan.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Julia Sanders, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

The Defendant was indicted by a Marion County grand jury for five counts of theft between the value of \$1000 and \$10,000 and five counts of aggravated burglary. The indictments arose from five home invasions in which numerous items of personal property were stolen. The Defendant pled guilty to two counts of aggravated burglary, both Class C felonies. The Defendant was sentenced as a Range I, standard offender to four years and six months on probation for each count to be served

concurrently. He was given credit for one hundred thirty-three days spent in jail awaiting trial on these charges.

The Defendant violated his initial sentence of probation by committing theft of a vehicle over the value of \$10,000. The Defendant pled guilty to the theft charge and entered a negotiated plea agreement to a sentence of four years with one year to be served in the Department of Correction and the remaining three years to be served on probation consecutively to the probationary sentence for the aggravated burglaries.

After being released from incarceration, the Defendant was again charged with violating his probation. The trial court held a probation revocation hearing. The Defendant's probation officer, Mr. James Janow, testified that the Defendant had been arrested for a domestic violence offense against his parents, with whom he was living during the period of his probation. The Defendant's father, Mr. Albert Lee Buchanan, Sr., testified that the Defendant became irate and "start[ed] breaking up stuff, tearing up, breaking glass and stuff." The Defendant then "ran into [his mother] and knocked her down." When his father tried to get "in between them . . . to get him settled down," the Defendant "picked up an aerosol can and [hit his father] in the head." Mr. and Mrs. Buchanan left the residence and reported the incident to the local authorities.

Mr. Janow also testified regarding other violations of the Defendant's probation. First, the Defendant never provided proof of employment as required by the conditions of his probation. Also, the Defendant had not paid his arrearages to the Board of Probation and Parole. Finally, the Defendant had only paid a minimal portion of the fines and court costs that he owed, also in violation of his conditions of probation. Based upon these violations, the State requested that the Defendant's probation be revoked and that he be ordered to serve his sentence in the Department of Correction.

The Defendant did not deny the probation violations but instead argued that he needed mental health treatment rather than incarceration. The Defendant's father opined that there is "something wrong" with the Defendant because he "just blows up and just start[s] destroying stuff, tearing up stuff." The Defendant's father also stated that the Defendant "watches [television] and some time [sic] he will talk to a [television] and one time he picked the [television] up and threw it off the deck" The Defendant's father also testified that the Defendant will "tear up stuff just for meanness and if we don't find it he bring [sic] it to us and show it to us . . . to start trouble." The Defendant's probation officer stated that the Defendant will sometimes "have just a blank look in [sic] his face like he's not paying attention" However, the probation officer also testified that the Defendant's family has taken him to mental health institutions on several occasions and that "everybody has come back and said that there was no mental problems with him."

Following the revocation hearing, the trial court revoked the Defendant's probation, reasoning as follows:

Given the proof that I've heard today and given his criminal history,
given his previous history of revocations and his inability to comply,

given his social history, I don't believe that [the Defendant] can . . . function in probation. I really think that the appropriate sentence here is to the Department of Corrections [sic] to serve the balance of his time.

The Defendant then filed a timely notice of appeal, and the case is now before this Court.

Analysis

The Defendant's sole issue on appeal is whether the trial court erred in revoking the Defendant's probation. The trial court has broad discretion to determine whether to revoke a sentence of probation:

If the trial judge should find that the defendant has violated the conditions of probation and suspension by a preponderance of the evidence, the trial judge shall have the right by order duly entered upon the minutes of the court, to revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered

Tenn. Code Ann. § 40-35-311(e). On appeal, this Court must uphold the findings of the trial court unless we determine that the trial court abused its discretion. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); see also State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). An abuse of discretion only occurs if it is established that "the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred." Harkins, 811 S.W.2d at 82. "The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment." Id.

_____The Defendant argues that the trial court abused its discretion by ordering the Defendant to serve his sentence in confinement rather than ordering that the Defendant receive some alternative sentence which included mental health treatment. We note that the record does not contain any evidence from a mental health professional indicating that the Defendant could benefit from mental health treatment.

We also note that the Defendant complains that the prosecutor's summary of the Defendant's prior convictions and supervision history violated Tennessee Code Annotated section 40-35-209(b), which states that the "rules of evidence shall apply [in a sentencing hearing], except that reliable hearsay including but not limited to certified copies of convictions or documents, may be admitted

if the opposing party is accorded an opportunity to rebut any hearsay evidence so admitted” Tenn. Code. Ann. § 40-35-209(b). However, the prosecutor’s summary of the Defendant’s past history was not offered as proof of any probation violation. The prosecutor’s statements were made on the record at the beginning of the hearing. The Defendant did not object to the prosecutor’s statements. The State properly presented witnesses—the Defendant’s probation officer and the Defendant’s father—to provide testimony regarding the violation. Thus, the prosecutor did not commit any misconduct, and the trial court did not err in allowing the prosecutor’s synopsis of the Defendant’s case history prior to the proof at the hearing.

We conclude that the trial court did not abuse its discretion in revoking the Defendant’s probation. First, the record from the revocation hearing demonstrates that the Defendant violated the conditions of his probation. The Defendant attacked his mother and hit his father in the head with an aerosol can, according to the Defendant’s father. Furthermore, the Defendant had previously violated his initial sentence of probation by committing a theft over the value of \$10,000. As such, the trial court acted within its discretion to revoke the Defendant’s probation. We find no abuse of discretion from the record.

Conclusion

Based upon the foregoing reasoning and authorities, we affirm the judgment of the trial court revoking the Defendant’s probation.

DAVID H. WELLES, JUDGE